U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VERONICA J. CURTIS and U.S. POSTAL SERVICE,
POST OFFICE, Forest Park, IL

Docket No. 01-1782; Submitted on the Record;
Issued June 26, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to present clear evidence of error.

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion by refusing to reopen appellant's case for a review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that her request for reconsideration was untimely filed and failed to present clear evidence of error.

On February 27, 1998 appellant, then a 49-year-old mailhandler, filed an occupational disease claim alleging that on January 17, 1996 she realized that her herniated lumbar disc at L4-5 was caused or aggravated by factors of her federal employment. She stopped work on January 20, 1996 and she returned to light-duty work on July 17, 1997.

By letter dated June 22, 1998, the Office accepted appellant's claim for a lumbosacral strain.

In a notice of proposed termination of compensation dated February 17, 1999, the Office advised appellant that it proposed to terminate her compensation because the medical evidence of record established that she did not have any residuals of her January 17, 1996 employment injury. The Office also advised appellant that if she disagreed with the proposed action, she could submit additional medical evidence supportive of her continued disability within 30 days.

By decision dated April 8, 1999, the Office terminated appellant's compensation on the grounds that appellant no longer had any residuals of her accepted employment injury.

By letter dated January 29, 2001, appellant, through her counsel, requested reconsideration of the Office's decision.

In a May 9, 2001 decision, the Office denied appellant's request for a merit review of her claim on the grounds that it was untimely filed and failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[1] As appellant filed her appeal with the Board on June 21, 2001, the only decision properly before the Board is the Office's May 9, 2001 decision.

Section 8128(a) of the Federal Employees' Compensation Act[2] does not entitle a claimant to a review of an Office decision as a matter of right.[3] The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.[4] The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[5]

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.[6]

The last merit decision in this case was issued by the Office on April 8, 1999, wherein the Office terminated appellant's compensation on the grounds that appellant was no longer disabled and did not have any residuals or disability causally related to her accepted January 17, 1996 employment injury. She requested reconsideration of this decision by letter dated January 29, 2001. Since appellant's request was made outside the one-year time limitation, the Board finds that it was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.[7] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year

[1] 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

[2] 5 U.S.C. § 8128(a).

[3] *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[4] 20 C.F.R. § 10.607(a).

[5] *See* cases cited *supra* note 3.

[6] *Larry L. Litton*, 44 ECAB 243 (1992).

[7] *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[8]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.[9] The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[10] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[11] It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.[12] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[13] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[14] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[15]

The issue for purposes of establishing clear evidence of error in this case is whether appellant submitted evidence establishing that there was an error in the Office's determination that she no longer had any residuals or disability due to her January 17, 1996 employment injury.

In support of her request for reconsideration, appellant submitted treatment notes of Dr. Harvey L. Echols, a Board-certified family practitioner, covering the period March 31, 1995 through December 14, 2000 regarding her back condition. Appellant also submitted a blood test, a magnetic resonance imaging scan and x-ray results. Disability certificates and work release forms were submitted covering intermittent periods between April 4, 1995 through April 2, 1998. In addition, appellant submitted referral forms, a March 17, 1998 report from Dr. Keith L. Schaible, a neurosurgeon and March 21, April 21 and June 9, 1997 reports from Dr. John F. Grady, a podiatrist. The Board finds that Dr. Echols' treatment notes, test results, disability certificates, work release and referral forms and the medical reports of Drs. Schaible and Grady

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[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d) (May 1996); *see also*, 20 C.F.R. § 10.607(b).

[9] *Dean D. Beets*, 43 ECAB 1153 (1992).

[10] *Leona N. Travis*, 43 ECAB 227 (1991).

[11] *Jesus D. Sanchez, supra* note 3.

[12] *Leona N. Travis, supra* note 10.

[13] *See Nelson T. Thompson*, 43 ECAB 919 (1992).

[14] *Leon D. Faidley, Jr. supra* note 3.

[15] *Gregory Griffin, supra* note 7.

are irrelevant inasmuch as they do not address whether appellant had any disability causally related to her January 17, 1996 employment injury.

The treatment notes of appellant's physical therapists are of no probative value inasmuch as a physical therapist is not a physician under the Federal Employees' Compensation Act and, therefore, is not competent to give a medical opinion.[16]

For these reasons, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under 5 U.S.C. § 8128(a) on the grounds that her application for review was not timely filed and failed to present clear evidence of error.

The May 9, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 26, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] 5 U.S.C. § 8101(2); *see also Jerre R. Rinehart*, 45 ECAB 518 (1994); *Barbara J. Williams*, 40 ECAB 649 (1989); *Jane A. White*, 34 ECAB 515 (1983).